Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B–02–608–1995
MAHADEV SHANKAR, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
22 AUGUST 1996

Civil Procedure *— Pleadings — Striking out statement of claim — Failure to plead compliance with written law — Compliance already on record by way of an agreed document — Whether trial judge should direct statement of claim to be amended instead of striking it out — Rules of the High Court 1980 O 18 r 19*

Unincorporated Associations *— Societies — Co-operative societies — Expulsion of members — Registrar-General directed that dispute be referred to court — Compliance with s 49(2)(c) of the Co-operative Societies Act 1948 had not been specifically pleaded in the statement of claim — Certificate directing referral to court already on record by way of an agreed document — Whether the entire action should be struck out — Whether court should have allowed amendment of statement of claim instead — Co-operative Societies Act 1948 s 49(1) & (2)*

The appellants were members of the respondent, a co-operative society registered under and governed by the Co-operative Societies Act 1948 ('the Act'). After their expulsion from the respondent society, the appellants referred the matter to the Registrar-General under s 49 of the Act. The Registrar-General directed the dispute to be referred to the court. A copy of the letter to this effect was extended by the Registrar-General to the Chairman and the secretary of the respondent. The plaintiffs filed an action in the High Court to implement the direction of the Registrar-General and ventilate the merits of the dispute in the court. The respondent took a preliminary objection that because compliance with s 49(2)(c) of the Act had not been specifically pleaded in the statement of claim, the entire action should be struck out. In its defence, the respondent did not plead that the action should not be entertained because the appellants had not complied with s 49(1) and (2) of the Act, nor was it pleaded that the action should be struck out because the appellants had not specifically averred in their statement of claim that the dispute had been referred to the Registrar-General and that he had directed under s 49(2)(c) of the Act that the dispute be referred to the court. A certificate from the Registrar-General that he had directed the parties to refer the dispute to court, as provided by s 49(2)(c) of the Act, was filed in the agreed bundle of documents. The trial judge struck out the action. The appellants appealed.

Held, dismissing the appeal:

If it was imperative that the statement of claim should plead compliance (notwithstanding that the fact of compliance was already

on record by way of an agreed document), the trial judge should have directed that the claim be amended. Striking out pleadings under O 18 r 19 of the Rules of High Court 1980 was a discretionary power to be exercised according to the justice of the case. This was not a case for striking out. All the more so as it had not been properly pleaded as a defence (see p 560H–I).

[Bahasa Malaysia summary

Perayu-perayu merupakan ahli penentang, sebuah persatuan koperasi yang didaftarkan di bawah dan dikuasai oleh Akta Pertubuhan Koperasi 1948 ('Akta tersebut'). Selepas pemecatan daripada koperasi penentang, perayu-perayu merujuk perkara itu kepada Ketua Pendaftar di bawah s 49 Akta tersebut. Ketua Pendaftar mengarahkan supaya pertikaian itu dirujuk kepada mahkamah. Sesalinan surat yang menyatakan arahan ini telah dihantar oleh Ketua Pendaftar kepada Pengerusi dan setiausaha penentang. Plaintif-plaintif memfailkan suatu tindakan di Mahkamah Tinggi bagi melaksanakan arahan Ketua Pendaftar dan untuk mengutarakan merit pertikaian di mahkamah. Penentang membuat bantahan permulaan bahawa oleh kerana pematuhan s 49(2)(c) Akta tersebut tidak dihujahkan secara spesifik dalam pernyataan tuntutan, keseluruhan tindakan haruslah dibatalkan. Dalam pembelaannya, penentang tidak menghujahkan bahawa tindakan itu harus dilayan sebab perayu-perayu tidak mematuhi s 49(1) dan (2) Akta tersebut, dan ia juga tidak dihujahkan bahawa tindakan itu harus dibatalkan sebab perayu-perayu tidak menegaskan secara spesifik dalam pernyataan tuntutan mereka bahawa pertikaian itu telah dirujuk kepada Ketua Pendaftar dan bahawa beliau telah mengarahkan supaya perkara itu dirujuk kepada mahkamah di bawah s 49(2)(c) Akta tersebut. Suatu sijil daripada Ketua Pendaftar bahawa beliau telah mengarahkan pihak-pihak merujuk pertikaian kepada mahkamah, seperti yang diperuntukkan oleh s 49(2)(c) Akta tersebut, difailkan dalam ikatan dokumen yang dipersetujui. Hakim perbicaraan membatalkan tindakan. Perayu-perayu membuat rayuan.

Diputuskan, menolak rayuan:

Jika ianya sangat mustahak bahawa pernyataan tuntutan harus menghujahkan pematuhan (meskipun fakta pematuhan sudah pun direkodkan melalui suatu dokumen yang dipersetujui), hakim perbicaraan sepatutnya mengarahkan supaya tuntutan itu dipinda. Pembatalan pliding di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 merupakan suatu kuasa budi bicara yang harus dilaksanakan menurut keadilan kes. Ini bukanlah suatu kes untuk pembatalan. Lebih-lebih lagi sebab ia tidak dihujahkan dengan wajar sebagai suatu pembelaan (lihat ms 560H–I).]

Notes

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

For cases on co-operative societies, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1636–1650.

Legislation referred to

Co-operative Societies 1948 ss 49(1)(c), (2), (2)(c)
Rules of High Court 1980 O 18 r 19

Appeal from: Suit No 22–101–1989 (High Court, Shah Alam)

Sathwan Kaur (*Dusing & Co*) for the first, second, fourth and fifth appellants.

N Mohanadas (*N Mohanadas & Co*) for the respondent.

Cur Adv Vult

Mahadev Shankar JCA (delivering the judgment of the court): The appellants/plaintiffs were members of the Board of the Koperasi Menara Maju Bhd ('the Koperasi') which was at all material times and still is a co-operative society registered under and governed by the Co-operative Societies Act 1948 ('the Act').

In September and October 1988, differences arose between the appellants on the one hand and the Chairman and other members of the Board of the Koperasi, which culminated in the purported suspension of the plaintiffs on 16 September 1988 being placed before the delegates extraordinary general meeting which purportedly expelled the plaintiffs from the Koperasi.

Section 49(1)(c) of the Act provides that if any dispute touching the business of a registered society arises between the society or its Board and any officer of the society, such dispute shall be referred to the Registrar-General for decision.

Section 49(2) of the Act reads:

> (2) The Registrar-General may, on receipt of a reference under sub-s (1) —
> (a) decide the dispute himself;
> (b) refer it for disposal to an arbitrator or arbitrators; or
> (c) require the parties concerned to refer the dispute to a court.

The plaintiffs referred to the Registrar-General by a letter dated 9 November 1988 (see appeal record ('AR') at p 78). The Registrar General replied on 23 November 1988 directing the dispute to be referred to the court (see AR at p 25). It is to be noted that a copy of this letter was extended by the Registrar-General both to the Chairman and the secretary of the Koperasi.

Unfortunately, the plaintiffs had filed an Originating Summons No 31–115–88 in the High Court at Kuala Lumpur on 17 November 1988 ('the first action') before the Registrar-General's letter was issued. The court therefore had no jurisdiction to entertain the first action and it was struck out for this reason on 24 October 1989. A

So the plaintiffs filed this action No 22–101 of 1989 in the High Court at Shah Alam on 5 December 1989 to implement the direction of the Registrar-General and ventilate the merits of the dispute in the court. After entering appearance, the defendants filed a statement of defence. Nowhere in this defence was it pleaded that this action should not be entertained because the plaintiffs had not complied with s 49(1) and (2) of the Act. Indeed, if such a plea had been raised, it would have been an abuse of process because the defendants knew that these provisions had been complied with. Nor was it pleaded in the defence that this action should be struck out because the plaintiffs had not specifically averred in their statement of claim that the dispute had been referred to the Registrar-General and that he had directed under s 49(2)(c) of the Act that the dispute be referred to the court. B C D

A summons for directions followed. The parties then filed a bundle of pleadings and also an agreed bundle of documents. The Registrar-General's letter of 23 November 1988 accompanied by his certificate that he had directed the parties to refer the dispute to court, as provided by s 49(2)(c) of the Act, was in this agreed bundle of documents. In other words, there was uncontested material before the court that s 49(2)(c) of the Act had been complied with. E

In spite of this, the defendants took a preliminary objection that because compliance with s 49(2)(c) of the Act had not been specifically pleaded in the statement of claim, the entire action should be struck out. F

Both parties were directed to file written submissions. The plaintiffs' counsel pointed out that the first action was struck out on technical grounds and therefore not *res judicata*, and more importantly, that s 49(2)(c) had been complied with. He had referred to the Registrar-General's certificate in the agreed bundle of documents which by then had been tendered to the court and therefore needed no further proof. G

Alas, the learned judge agreed with the counsel for the defendant, and struck out the action!

With all due respect to the trial judge, if he thought that it was imperative that the statement of claim should plead compliance, (notwithstanding that the fact of compliance was already on record by way of an agreed document), he should have directed that the claim be amended. Striking out pleadings under O 18 r 19 of the Rules of High Court 1980 is a discretionary power to be exercised according to the justice of the case. The Supreme Court Practice is replete with judicial precedents to show that this was not a case for striking out and forensic courtesy should have persuaded counsel for the defendant to inform the judge that the point was a non-starter. All the more so as it had not been properly pleaded as a defence. H I

A For reasons not clear to us, this action took six years to come to trial. Despite the passage of time, appellants' counsel informed us that the issues are still alive. We therefore remitted the matter back to the High Court for trial before another judge.

It is with great regret that we ordered the costs of this appeal and the B costs of the day of the trial and the written submissions in the court below to be taxed and paid by the appellants to the respondent but only in any event and upon conclusion of the action in the court below, and for the deposit to be paid to the respondent towards those costs. We did this because we thought that the plaintiffs should immediately have amended their statement of claim when the objection was made known to them. We C also gave the appellants three weeks to amend their statement of claim accordingly.

We hope, however, that time in her role as the great healer will ensure that better counsel will prevail and the parties will be able to resolve their differences without straining the limits of the litigation process.

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Appeal dismissed.

Reported by Loo Lai Mee

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